FILED

MAY 6 1970

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1395.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,

Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

CLARENCE M. MULHOLLAND,
RICHARD M. COLASURD,
741 National Bank Building,
Toledo, Ohio 43604,
Attorneys for Brotherhood of Locomotive Firemen and Enginemen.

MULHOLLAND, HICKEY & LYMAN,
741 National Bank Building,
Toledo, Ohio 43604,
Of Counsel for Brotherhood of Locomotive Firemen and Enginemen.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 861-5647

TABLE OF CONTENTS.

Statement of the Case ---------- 1

Argument ---------- 8

Conclusion ---------- 9

TABLE OF CITATIONS.

Cases.

Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. R. Co., 372 U.S. 284, 290-291 (1963) --- 3

Brotherhood of Railroad Trainmen v. Akron & Barberton Belt Railroad Company, 385 F.2d 581 (D.C. Cir. 1967), cert. den. 390 U.S. 923 ---4, 6, 7, 8

Detroit and Toledo Shore Line R. Co. v. BLFE, 357 F.2d 152 (6th Cir. 1966) ---------- 8

Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946) ---------- 9

Shore Line R. R. Co. v. United Transportation Union, ---- U.S. ----, 24 L. Ed. 2d 325 (1969) ------- 8

Statutes.

Public Law 88-108, 77 Stat. 132 ---------- 3

Railway Labor Act, as amended

(45 U.S.C. Sec. 151, et seq.) ---------- 1

(45 U.S.C. Sec. 152 Seventh) Section 2 Seventh 6

(45 U.S.C. Sec. 156) Section 6 ---------- 6

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1395.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY,

Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioner, The Detroit and Toledo Shore Line Railroad Company (hereafter Shore Line), operates over its line of railroad between Lang Yard in Toledo, Ohio, and Detroit, Michigan, and over the lines of other railroads to other points in the State of Michigan. Approximately 3.5 miles of its tracks are in Ohio and 46 miles in Michigan. Respondent Brotherhood of Locomotive Firemen and Enginemen (hereafter BLFE) represented for purposes of collective bargaining under and pursuant to the Railway Labor Act[1] the crafts or classes of enginemen and firemen employed by Shore Line.[2]

---

[1] 45 Stat. 577, as amended, 45 U.S.C. § 151, et seq.

[2] Effective January 1, 1969, the United Transportation Union became the successor organization to the BLFE, Brotherhood of Railroad Trainmen, Switchmen's Union of North America, and the Order of Railway Conductors and Brakemen.

In 1937 most United States carriers signed a National Diesel Agreement with the BLFE providing for the employment of firemen on practically all diesel powered locomotives.

On August 13, 1943, Shore Line and many other carriers entered into another National Diesel Agreement with the BLFE providing that "A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives; * * *." Similar terms endured in the subsequent 1950 National Diesel Agreement to which the Shore Line is not party.

Although the 1943 National Diesel Agreement required the employment of firemen, it did not concern itself with rates of pay, rules and working conditions of firemen employed by each carrier. On January 1, 1945, Shore Line and the local General Chairman of the BLFE entered into a 43-page local agreement detailing the rates of pay and working conditions of firemen. In 1953 they entered into another lengthy local agreement concerning rates of pay, rules and working conditions of firemen which agreement superseded the local agreement of January 1, 1945.

In 1956, the nation's carriers gave hint that they wanted discretion to determine the employment of firemen. By notice dated November 2, 1959, the Shore Line informed the BLFE pursuant to Section 6 of the Railway Labor Act[3] that effective January 1, 1960, Shore Line intended to "eliminate all agreements * * * which require the employment or use of firemen on other than steam power;" and to establish a rule that Shore Line "shall have the unrestricted right under all circumstances to determine when and if a fireman shall be used." All

---

[3] 45 U.S.C. § 156.

other carriers served similar notices on the BLFE. (Notices concerning other matters were served on other Brotherhoods.) Meanwhile the lengthy procedures mandated by the Railway Labor Act continued. On March 4, 1963, this Court ruled that the parties had exhausted all the tools of the Act and the parties were free to resort to self-help, subject only to creation of an Emergency Board under Section 10 of the Act.[4] A Board was convened, made an investigation and filed its report.

On August 23, 1963, the Shore Line notified the firemen on its property that effective August 29, 1963, it intended to effect a rule that it:

> "* * * has the unrestricted right, under all circumstances, to determine when and if a fireman (helper) shall be used on other than steam power in all classes of freight * * * and * * * yard service * * *."

It further notified its firemen that all agreements would be cancelled that conflict with the proposed rule. Similar notices were served by the other carriers.

On August 28, 1963, one day before the work rules were to become effective, Public Law 88-108, 77 Stat. 132, was passed forbidding unilateral self-help by the parties and creating a Board of Arbitration, since referred to as Board 282. The Board was ordered to pass on two major issues: the use of firemen, and the size and composition of train crews. The Award, since referred to as Award 282, was to be binding on the parties and to continue in force for a period not to exceed two years. The termination date as to the BLFE was March 30, 1966. Award 282 provided a procedure whereby carriers could "blank" or abolish firemen positions at three-month intervals.

---

[4] *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co.*, 372 U.S. 284, 290-291 (1963).

In 1964 the Shore Line, acting pursuant to Award 282, abolished all firemen assignments on through and local freight trains and yard engines. It also discharged, pursuant to the award, a fireman it had hired in 1963 who had a yard assignment in Michigan.[5] However, because of the Ohio full crew law Shore Line assigned a fireman, sometimes referred to as a "shuttle-fireman," to each of its southward trains at Mile Post (MP) 3.8 for operation into Lang Yard in Toledo. MP 3.8 is near the Michigan line and 3.8 miles north of the southern point of the Shore Line property. For all northward trains operating out of Lang Yard, a fireman was assigned to each locomotive and left the crew at MP 3.8.

On March 30, 1966, Award 282 expired. However, various questions arose, one of which was what work rules were in force the day after Award 282 expired. Suits and countersuits were filed, appeals and cross-appeals taken and decided in one opinion by the United States Court of Appeals for the District of Columbia Circuit.[6] Certiorari was denied by this Court on January 30, 1968, 390 U.S. 923. The Shore Line and the BLFE were parties to that litigation and decision.

It had been the position of the carriers including the Shore Line that when Award 282 expired, the blanking procedures continued in effect and constituted a continuing mechanism for reducing the employment of firemen.[7] This contention was rejected by the Court of Appeals:

> "* * * Upon the expiration of the two-year period the special machinery was exhausted and in the absence of agreement only the system of the Railway Labor

---

[5] Michigan does not have a full crew law.

[6] *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt Railroad Company*, 385 F.2d 581 (1967), hereafter sometimes referred to as the *Akron* case.

[7] *Id.* at 608.

Act was available for future changes in substantive work rules * * *." [8]

The Court of Appeals pointed out that the National Diesel Agreement requires that a fireman be employed on all locomotives, and said:

"* * * Award 282 continued this requirement (and any others stemming from agreement or practice), until changed in accordance with the Award * * *. But when the Award expired, so did the procedures it suggested. What survives is the complex of work rules in force on the last day prescribing the substantive terms that controlled the use of firemen on individual runs.[9]

"The National Diesel Agreement was not set aside by the Board * * *." [10]

The Court also stated as follows:

"In consequence, a carrier is not only prevented from taking 'affirmative acts' under the Award to reduce the use of firemen, as the District Court properly held, but also, if the carrier was required to keep a fireman on a particular crew as of the last day of the Award, it cannot thereafter change the work rule by discontinuing that position, except by agreement or in accordance with Section 6. The work rule that continues in force provides for a fireman on this crew, and that is not changed because the particular fireman on duty dies or retires." [11]

The Court of Appeals further stated:

"* * * The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Rail-

---

[8] *Id.* at 608.
[9] *Id.* at 610.
[10] *Id.* at 611.
[11] *Id.* at 611.

> way Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change * * *." [12]

Despite these holdings to which it was party that the blanking procedures under Award 282 expired on March 30, 1966; that the National Diesel Agreement was not set aside; and that any changes must be by agreement or pursuant to Section 6 of the Act; the Shore Line on February 8, 1968, and eight days after this Court denied certiorari, unilaterally and without notice abolished the shuttle-firemen positions.

Claiming that Shore Line violated the provisions of Section 2 Seventh of the Railway Labor Act,[13] the BLFE, on February 14, 1968, filed its complaint for injunction (A. 3-7)[14] seeking to require Shore Line to employ firemen on its locomotives in Ohio until such time as Shore Line resorts to and exhausts the mandatory procedures specified by the Railway Labor Act. On March 4, 1968, Shore Line filed its answer. On that date, and despite the decision of the Court of Appeals in the *Akron* case, the Shore Line insisted that the blanking procedure for abolishing firemen pursuant to Award 282 was still in effect (A. 24, 133).

---

[12] *Id.* at 593.

[13] 45 U.S.C. § 152 Seventh: "No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act."

[14] Appendix in the court below.

Shore Line also defended its action of abolishing the shuttle-firemen positions by claiming that the Ohio full crew law was no longer applicable because of its reconstruction of its tracks (A. 10). However, this defense also constituted a repudiation of the *Akron* decision to which it was party, for the Court of Appeals had said:

> "* * * The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.
>
> "The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. * * * But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. * * *" [15]

Attempted removal by the Shore Line of the bar of the Ohio full crew law did not materialize during the 2-year lifetime of Award 282.

And on April 3-4, 1968, at the hearing on the motion for preliminary injunction, the Shore Line for the first time in the history of its dealings with the BLFE claimed that the 1943 National Diesel Agreement was terminated in 1953 when no reference was made to it in the 1953 local agreement setting forth rates of pay, rules and working conditions. If this claim had any basis, Shore Line could have abolished all firemen assignments in Michigan in 1953. But the facts are that it employed firemen since 1953 in Michigan which did not have a full crew law; it served a Section 6 notice on the BLFE in 1959 stating that

---

[15] 385 F.2d at 611-612.

it intended to eliminate its agreement which requires the employment of firemen; it joined the national movement with other carriers which eventually led to Award 282; and in 1964, pursuant to that Award, it wasted no time in abolishing firemen positions in Michigan.

ARGUMENT.

This case illustrates the Shore Line's continued attempt to avoid its obligations under the Railway Labor Act and to ignore the rights of the BLFE.[16] In *Shore Line R.R. Co. v. United Transportation Union*, ____ U.S. ____, 24 L. Ed. 2d 325 (December 9, 1969) it unilaterally sought to change working conditions without following the procedures of the Act. This Court held, however, that the status quo provisions of the Act extend to actual working conditions out of which a dispute arose and those conditions need not be covered in an existing agreement. And it simply refuses to acknowledge the decision of the *Akron* case.

In this case Shore Line has sought to avoid the procedures of the Act for changing agreements by its contrived argument that the 1943 National Diesel Agreement was terminated in 1953 and its further claim that a resolution of that argument is one to be decided by the National Railroad Adjustment Board. As we have pointed out this claim is made in bad faith, is completely inconsistent with Shore Line's employment of firemen since 1953, and its joining of the national movement to terminate the diesel agreement culminating in Award 282. The question presented by Shore Line in its petition filed herein discloses that it is not important, but solely concerns its quarrel with the decisions of the courts below.

---

[16] See *Detroit and Toledo Shore Line R. Co. v. BLFE*, 357 F.2d 152 (6th Cir. 1966).

Shore Line cites *Pitney*[17] for its argument that the "decisions below are flatly contrary to applicable decisions of this Court."[18] *Pitney* held that the proper forum for interpreting agreements is the National Railroad Adjustment Board. Nothing in the decisions below reveal the remotest conflict with *Pitney*.

The action below by the BLFE was one to require Shore Line to comply with the positive mandates of the Railway Labor Act for changing agreements and working conditions. In its attempt to avoid its obligations under the Act and to rid itself of the jurisdiction of the district court, it claimed a "minor" dispute was involved. The courts below correctly rejected this argument.

CONCLUSION.

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CLARENCE M. MULHOLLAND,
RICHARD M. COLASURD,
741 National Bank Building,
Toledo, Ohio 43604,
Attorneys for Brotherhood of Locomotive Firemen and Enginemen.

MULHOLLAND, HICKEY & LYMAN,
741 National Bank Building,
Toledo, Ohio 43604,
Of Counsel for Brotherhood of Locomotive Firemen and Enginemen.

---

[17] *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946).

[18] Petition for Writ of Certiorari, at 6.